

Memorandum

To: L Lou Feletto
Environmental Fees Section

Date: December 19, 1994

From: Blanca M. Breeze (322-2977)
Staff Counsel

Subject:

Janet Vining asked me to respond to your request that we review the consent agreement in the above-referenced matter and provide you with an updated legal opinion as to the feepayer's petition.

In Janet Vining's memorandum to you dated December 17, 1992 (copy enclosed) she advised you that the settlement does not bar the Board from issuing a notice of determination to for the hazardous waste facility fee. Upon further review of the settlement and pertinent legal authority, we once again conclude that the settlement is not binding on the Board. Accordingly, we would suggest that the matter be scheduled for an Appeals Conference.

The settlement which you have submitted for our review states, at page 5, that it purports to settle the allegations in the complaint. We have no evidence to suggest that any allegations relating to fees were included in the complaint. The complaint was filed by the Office of the Attorney General on behalf of the California Department of Health Services. The Board of Equalization was not a party to this action. In fact, Deputy Attorney General Edwin F. Lowry, who represented the Department of Health Services, stated in a letter to attorney, dated May 24, 1994 (copy enclosed), that the subject of hazardous waste fees was never discussed or considered in negotiating the settlement of penalties. Moreover, Mr. Lowry states in his letter that, in settling this case, he did not mean to preclude or prevent any collection of penalties.

Furthermore, at page 5 the Stipulation clearly states that "...nothing in this agreement is intended to preclude any state agency, department, board or entity from exercising its authority under any law, statute, or regulation." At page 6, the

Stipulation declares that "[t]his Agreement shall apply to and be binding upon the Department¹ and , their directors, officers, employees and agents and the successors or assigns of either of them." (Footnote added.) Clearly, had the parties considered that the Stipulation would apply to the Board of Equalization, such a reference would have been included in the Stipulation. Moreover, as stated above, the Board did not participate in the litigation or consent to the Stipulation.

In attempting to collect the fees and penalties at issue in this matter, the Board is performing an official act which it is required by law to perform. (cite) Nothing in the Stipulation purports to indicate that the agreement between the parties overrides this duty of the Board to pursue collection of these statutory fees and penalties. The Board did not ratify the Stipulation. It has been held that a litigant should be able to deal with the state as a single entity to avoid being caught in the midst of a power struggle among various state agencies and other entities. However, when the particular situation shows that the litigant is attempting to secure concessions which would limit the powers of other state agents or entities, which he knows are involved and are not parties to the action, the argument does not survive scrutiny. (People v. Hy-Lond Enterprises, Inc. (1979) 93 Cal.App.3d 734; 155 Cal.Rptr 880.)

settled its dispute with the Department of Health Services, represented by the Attorney General. At no time was the Board a party to the litigation. The Board did not consent to the Stipulation. Consequently, the Stipulation does not bar the Board from proceeding with collection of the outstanding statutory fees and penalties.

Should you have any further questions regarding this matter, do not hesitate to contact me at 322-2977.

Blanca Bruce

BMB:ph

cc: Stephen R. Rudd
Dave McKillip
Lawrence A. Augusta
Janet Vining

¹ Within this context, the term "department" means the Department of Health Services.